

Yasmin Yorker
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: June 27, 2000 - 65 Federal Register 39650-39701
Draft Guidance for EPA Assistance Recipients
Administering Environmental Permitting Programs (Draft Recipient Guidance)
and Draft Revised Guidance for Investigating Title VI Administrative
Complaints Challenging Permits (Draft Revised Investigation Guidance)

Dear Ms. Yorker,

Associated Builders and Contractors (ABC) is a national trade association representing general contractors, subcontractors, material suppliers, and other construction-related firms. On behalf of our 23,000 member firms and 82 chapters, we respectfully submit these comments in response to your notice outlining the proposed Environmental Justice Guidelines.

ABC opposes any attempt by the Environmental Protection Agency to circumvent rulemaking procedures by issuing Guidances instead of Proposals. That is especially unacceptable with an issue as broad and far-reaching as these Environmental Justice Guidelines, which will have the clear effect of a promulgated rule. Our primary concerns are that 1) the EPA does not have the authority to issue such a document, and 2) the document itself lacks clarity, and creates uncertainty and conflicts with existing programs and practices. Because they were issued in a single notice, our comments will refer to both the Draft Recipient Guidance and the Draft Revised Investigation Guidance as a single Guidance.

I. The EPA has no authority to issue this Guidance without following formal rule making procedures. The conditions, requirements, and effects of the Environmental Justice Guidelines will have a significant, widespread impact that has not been properly assessed. Failure to allow the full notice and comment of what amounts to a proposed rulemaking is a clear violation of the Administrative Procedures Act (5 U.S.C. Section 702 et seq.) Because the Guidelines are more appropriately addressed as a rulemaking - and one which

will have a significant impact on a large number of small entities - they should be subject to the following:

- * An Advocacy Review Panel pursuant to the Small Business Regulatory Enforcement Fairness Act amendments to the Regulatory Flexibility Act [see 5 U.S.C. 601 et seq.] - analyzes the impact on small businesses
- * Regulatory Flexibility Analysis (5 U.S.C. 601) - to assess whether there will be a significant impact on a large number of small entities
- * Unfunded Mandates Act (5 U.S.C. 804) - to assess whether it will impose an annual burden of \$100 million or more on state and local governments
- * Executive Order 12866 - requires that proposed rules be submitted to the Office of Management and Budget (OMB) for evaluation prior to promulgation, and determination of significant rule status

1. EPA may not cite the Executive Order on Environmental Justice [EO 12898] as authority, beyond existing statutes and regulations, to deny or condition a permit where the Order states, "federal agencies must implement this Order consistent with, and to the extent permitted by the law."

2. The choice of issuing guidance rather than regulation means the guidance document is theoretically not binding on the states. This means that compliance, enforcement, and adherence to the guidelines will vary across states, which provides no certainty for affected stakeholders.

3. EPA must work with Congress to clearly establish the boundaries of federal executive branch authority.

II. The Guidance lacks clarity, creates uncertainty and conflicts with existing programs and practices.

1. States

A. As a co-regulator with EPA, the state should have an opportunity to work with the EPA in developing Title VI policies, rather than an after-the-fact opportunity to comment.

B. The extent of the state agencies' social, scientific, and legal obligation is unclear, as is state authority to carry out those obligations as expressed in the Guidance.

C. The impact of the Guidance on previously adopted state rules and regulations for implementation for addressing Title VI complaints should be assessed.

D. The role of local governments along with their authority is still substantially ignored in the revised guidance. The discussion of Area Specific Agreements implies their participation, yet no reference is made, nor is there any effort to address, limitations on the states' legal

authority. The Guidance also does not address or attempt to resolve conflicts with other laws, programs, or policies such as local zoning laws, HubZones, brownfield redevelopment, greenspace preservation or mitigation initiatives.

E. The high costs associated with the operation of state Environmental Justice programs is recognized, but then dismissed because the guidance is voluntary. The source(s) of necessary funding are not specified or identified. Does U.S EPA plan to furnish federal funding to offset this resource burden, or will these costs be passed on to states and permit applicants?

2. Existing Programs

A. The Guidance fails to recognize the environmental, social, and health benefits achieved by states' existing permitting programs.

B. The EPA is judging, after the fact, permitting programs that it has already approved. The Guidance states that compliance with environmental laws does not constitute per se compliance with Title VI. In fact, under the Guidance, an affected party cannot be assured of compliance with Title VI.

C. The EPA presently asserts the authorization to consider environmental justice complaints in the context of new permits, permit modification, and permit renewal. Permit modifications that result in environmental improvement are encouraged. Claims based on modifications that are environmentally impact neutral are likely to be dismissed. Generally, permit renewals are treated and analyzed as if they were new permits under the regulations. In order to establish compliance with Title VI, EPA should focus the Office of Civil Right's limited investigative resources on state permitting programs, rather than individual permits. This should be of primary consideration, given EPA's assertion in the Guidance "that individual permit actions are unlikely to create significant adverse disparate impacts."

D. EPA clearly states that a Title VI complaint does not nullify or even stay a permit, and that investigating and resolving Title VI complaints must not create unnecessary delays in the environmental permitting process. It is only logical that the permit process should not be halted by the filing of a complaint, but it is unrealistic to assume that the filing will have no effect on the permit.

3. Permittee

A. The impact of the document on the rights of the permit applicant is unclear. The permittee, whose permit is subject to modification, suspension, or revocation, should be provided with constitutional due process and whatever process is due under the state agencies' regulations.

B. There are no distinctions made between permit applications for temporary vs. fixed-source discharges or emissions.

4. Economic benefit

The potential economic and social benefits that a regulated facility may bring to a community are not properly recognized.

5. Affected Community

Whether the Guidance intends to include low-income, non-minority communities under the protection of Title VI is unclear. "Environmental justice community" and "affected community" is undefined. (However, Title VI is not applicable as a matter of law to groups of people where race is not the predominate factor.)

6. Justifications

A. EPA procedures in the Guidance conflict with existing Title VI law. For example, contrary to present understanding of the law, under the Guidance, opportunity for the recipient to justify its permitting decision occurs late in the process and only if rebuttal and mitigation have failed. Further consideration of justification should occur before an initial finding is made.

B. Economic development is factored into most permitting decisions but is basically ignored in the Guidance.

C. EPA recommends that states identify locations where Area-Specific Agreements might be useful. The negative result of doing so would be the creation of areas which would prove less attractive to new or expanding businesses, often discouraging investment where it is most needed.

D. In describing justification, the Guidance indicates that it is up to the "recipient" - in this case the state or permit issuer - to "show that the challenged activity is reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission." But many legitimate and important activities are not integral to the recipient's institutional mission, since the recipient is typically only performing a regulatory function. Rather, it is the reason for the issuance of the permit itself that should be assessed for its importance and legitimacy.

7. Sound Science/Impact Analyses

A. Cumulative impacts of all releases as well as the impact of unregulated factors such as noise and odor will be included in EPA's adverse impact analyses. Many of these factors cannot even be quantified.

B. The scope of impacts considered is overly broad and includes factors outside those which are actually within the legal authority of the permitting agency

C. The Guidance fails to determine whether an adverse impact actually results from the alleged discriminatory act itself.

D. There is a presumption that disproportionate racial distribution represents a disparate impact.

- E. There are no standards for data and analytic methods of acceptable quality. Data must be based on sound science, such as that which is based upon on ambient monitoring, actual exposure mechanisms, and known releases of stressors into the environment.
- F. The standards and methodology for conducting adverse impact analysis, especially involving cumulative impacts, lack specificity and assurance that sound peer-reviewed science will be used.

8. Filing Title VI Complaints

- A. Persons without a genuine stake in the community are allowed to file complaints.
- B. EPA should give "due weight" in the Title VI process only to complaints which arise from concerns voiced during the permitting process.
- C. The thresholds for who can file a complaint and for the acceptance of complaints are too low. The statement that "complainants do not have the burden of proving their allegations are true" invites frivolous complaints.

9. Decision Timelines/Permit Process/Satisfying Title VI Requirements

- A. Timelines for investigation and resolution of complaints are not clearly delineated.
- B. The Guidance does not provide definite timeframes for state and stakeholder actions, or take into consideration planning and investment requirements for certainty and timeliness.
- C. The permitting process itself does not contain well-defined decision points, creating uncertainty for everyone involved, including investors, workers, owners, local development boards, etc.
- D. The Guidance fails to lay out a clear process that if followed, will satisfy Title VI concerns. The process described here lacks the clarity and certainty that are fundamental requirements of a sound regulatory process.
- E. EPA stresses that the entire process described in the Guidance is completely voluntary, and that "EPA may decide to follow the guidance provided, or to act at variance with this guidance, based on its analysis of the specific facts presented." There is no certainty for stakeholders to follow.
- F. The Guidance does little to help states avoid Title VI complaints, nor does it lay out the requirements which, when followed, would assure compliance and therefore exemptions from Title VI complaints.
- G. The Guidance does not allow the states to develop environmental equity programs that would automatically satisfy Title VI requirements.

10. Comparison Populations/Disparate Impact

- A. Arbitrarily drawing circles around an installation and assuming that the population within the circles will be negatively impacted lacks any scientific basis as well as common sense.
- B. EPA expects to find "similar" levels of risk everywhere in a state,

regardless of the location. The Guidance does not take into account zoning, expense, proximity to similar facilities, development history, etc.

C. EPA also makes the assumption that where significant adverse disparate impacts have been found, they are evidence of unlawful discrimination in the permitting process. One is not necessarily a correlate of the other. Land use planning, zoning and socioeconomic considerations are just three of the factors which may contribute to adverse impacts. Just as equality of opportunity does not guarantee equality of outcome, neither should determinations of "environmental injustice" be based on the idea that all areas within a state should be exactly the same. Permitting actions seldom impacts on all segments of the population equally, and a discriminatory effect may be found where there was no discriminatory intent. Risks, impacts, and populations are never equally distributed.

11. Definitions

A. The Guidance lacks clearly defined terms and requirements.

B. There is no single definition of adverse disparate impact. Similarly, terms such as "adequate justification" or "comparison populations" are not specifically defined.

C. The Guidance fails to define clearly how to select a comparison population, which is a key component of determining whether disparate impact exists.

D. Approaches to Title VI compliance will be given "due weight" if a complaint is filed, but just what constitutes "due weight" is undefined. EPA does not specifically define its requirements, which means that permit applicants and issuers do not know what steps need to be taken, or whether or not the proper steps have been taken. EPA allows itself complete discretion, as if trying to "have their cake and eat it, too."

ABC opposes this attempt by the Environmental Protection Agency to circumvent rulemaking procedures by issuing Guidances instead of Proposed Rules. The Environmental Justice Guidelines will have the clear effect of a major rule, and should therefore be subject to the same procedures as any other significant rulemaking.

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